

# **TRANSCRIPT OF RECORD.**

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, [REDACTED] 1923**

**No. 835 261**

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**CITIZENS SAVINGS BANK AND TRUST COMPANY,  
APPELLANT,**

*v.s.*

**JOSEPH F. SEXTON, AS EXECUTOR OF THE ESTATE OF  
QUINCY D. CHAPMAN, DECEASED, ET AL.**

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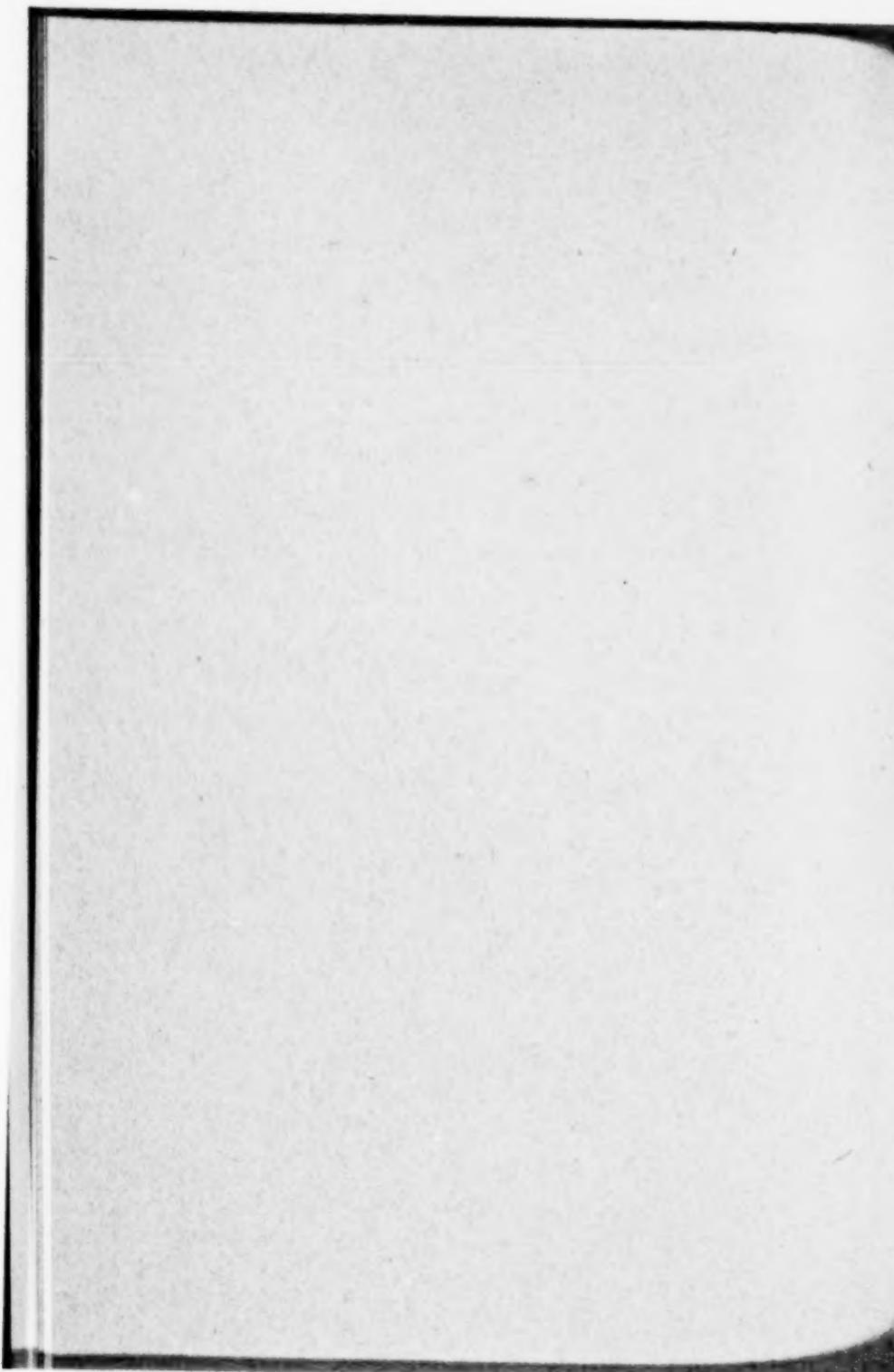
**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF WASHINGTON.**

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**FILED MARCH 27, 1923.**

**(29,483)**



(29,483)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 933.

CITIZENS SAVINGS BANK AND TRUST COMPANY,  
APPELLANT,

*vs.*

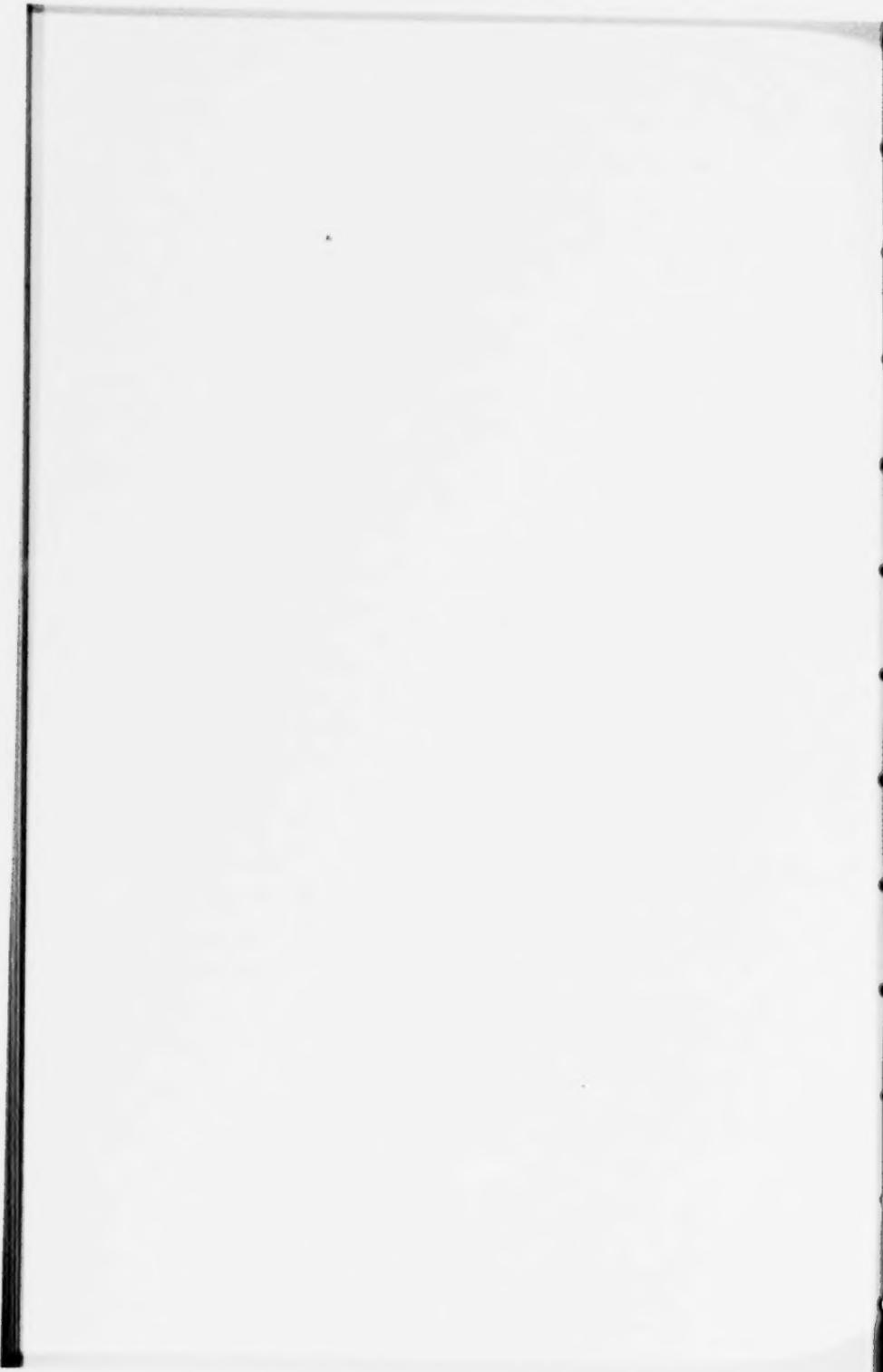
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
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Original. Print.

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[ ] IN THE

**DISTRICT COURT OF THE UNITED STATES FOR THE  
EASTERN DISTRICT OF WASHINGTON, NORTHERN  
DIVISION.**

No. 3980.

CITIZENS SAVINGS BANK & TRUST COMPANY, a Corporation,  
Complainant,

vs.

JOSEPH F. SEXTON, as Executor of the Estate of Quincy D. Chapman,  
Deceased; Millard F. Chapman, and Mrs. H. Ferry, Defendants.

**Names and Addresses of Solicitors of Record.**

L. H. Brown, Solicitor for Complainant, 801 Old National Bank  
Bldg., Spokane, Washington.

Danson, Williams & Danson, Solicitors for Defendant, 901 Paul-  
sen Building, Spokane, Washington.

2 In the District Court of the United States for the Eastern  
District of Washington Northern Division.

[Title omitted.]

**Bill of Complaint.**

[Filed Apr. 15, 1922.]

To the Hon. Frank H. Rudkin, Judge of the District Court of the  
United States for the Eastern District of Washington, Eastern  
Division:

The Citizens Savings Bank & Trust Company, a corporation, duly  
organized by and existing under the laws of the State of Vermont,  
and having its principal place of business at St. Johnsbury in said  
State, and a citizen of said state, humbly complains against Joseph  
F. Sexton, as executor of the estate of Quincy D. Chapman, deceased,  
said Joseph F. Sexton being a citizen of the State of Washington,  
and residing in Spokane County of said State; and against Millard  
F. Chapman, a citizen of the State of Michigan and residing in  
Kalamazoo County, of that State, and against Mrs. H. Ferry, a  
citizen of the State of Ohio, and residing at Kingsville in Ashtabula  
County of said State.

And your complainant therefore complains and says:

1. That at all times herein mentioned complainant, Citizens  
Savings Bank & Trust Company, was and is a corporation, organ-

## Bill of Complaint.

ized and existing under the laws of the State of Vermont, and having its principal office at St. Johnsbury, Vermont, and has paid all license fees to and complied with all regulations of the state of Vermont, with respect to corporations organized therein, and that its charter and articles are in full force and effect.

3. That on the 1st day of September, 1908, at Spokane, in the State of Washington, James W. Hays and Lillie Hays, his wife, for a valuable consideration to them paid, made, executed and delivered to M. L. Bevis, their certain principal first mortgage note in the sum of Five Thousand (\$5,000) Dollars, together with certain interest coupons attached thereto.

3. That thereafter, and on to-wit the third day of September, 1908, and in order to secure the payment of the note set forth in the preceding paragraph hereof, said James W. Hays and Lillie G. Hays, his wife, for a valuable consideration to them paid, duly executed and delivered to said M. L. Bevis, their certain real estate mortgage, dated September 1, 1908, by which they did grant, bargain sell and convey to said M. L. Bevis, the following described real estate, of which they were then the owners and in possession, situated in Douglas (now Grant) County, Washington, and which said real estate was and is within the above entitled judicial district of this Court, to-wit:

"All of Section Five (5) in Township Nineteen (19) North Range Twenty-six (26) E. W. M.

That said mortgage was duly acknowledged and thereafter and on to-wit the 9th day of September, 1908, recorded in the office of the auditor of said Douglas County, Washington, in Book "U" of Mortgages, page 530.

4. That thereafter and on or about to-wit the — day of —, 1908, said M. L. Bevis, for a valuable consideration duly endorsed, transferred and assigned said promissory note and the said mortgage to Citizens Savings Bank & Trust Company, complainant herein, which said assignment of mortgage was thereafter recorded in the office of the Auditor of Grant County, Washington, in Book —, page —, and said complainant has at all times since been and now is the owner and holder of said note and mortgage and entitled to all sums due or to become due thereon.

5. That thereafter and on, to-wit the 11th day of October, 1911,  
said James W. Hays, and Lillie G. Hays, his wife, for a  
4. valuable consideration, made, executed and delivered to said

Quiney D. Chapman, a warranty deed to an undivided one-half interest in and to said lands subject to complainant's said mortgage, for Five Thousand Dollars, said deed being by said Chapman filed for record and recorded in Book 6, page 494, records of Grant County, Washington and that as part of the consideration for said transfer, said Quiney D. Chapman assumed and agreed to pay one-half of complainant's said mortgage.

6. That thereafter and on to-wit the 17th day of August, 1917,  
said James W. Hays, and Lillie G. Hays, his wife, for a valuable  
consideration, made, executed and delivered to said Quiney D.

Chapman a warranty deed, covering all of the interest of said Hays and wife, in and to said lands, by the terms of which deed, said Quincey D. Chapman assumed and agreed to pay the said \$5,000.00 mortgage heretofore described together with all interest and accumulations thereon, and which said deed said Quincey D. Chapman caused to be filed and recorded in the office of the Auditor of Grant County, Washington, in Book 19 of Deeds, at page 474, on September 7, 1917.

7. That said James W. Hays and Lillie G. Hays, his wife, have ceased to have any interest in the said above described real estate or any part thereof.

8. That thereafter and on to-wit the 3rd day of Octo<sup>r</sup>, 1917, said Quincey D. Chapman for a valuable consideration made and entered into a written agreement with this complainant by the terms of which said mortgage was extended to January 1st, 1923, and by the terms of which said Quincey D. Chapman agreed to pay the same and the whole thereof, together with all accumulations of interest thereon (a copy of which instrument of extension is hereto attached, marked "Exhibit A" and made a part of this Bill of Complaint).

9. That by the terms of said mortgage and said extension agreement, it was provided that in the event of default in the payment of the principal or interest of said note and mortgage, after the same should become due and payable, the holder thereof might declare the whole, both principal and interest, due and payable  
5 without further notice and might immediately bring suit to foreclose said mortgage.

10. That the said Quincey D. Chapman died on or about the 21st day of December, 1921, testate, and by the terms of his will, defendants Millard F. Chapman and Mrs. H. Ferry, are sole devisees of said Quincey D. Chapman, deceased, and by virtue thereof, have or claim to have some right, title, estate, lien or equity in or to the property described in this Bill of Complaint, and are necessary and indispensable parties defendant to this action.

11. That thereafter and about the — day of January, 1922, said will was admitted to probate in the Superior Court of Spokane County, in the State of Washington, and Joseph F. Sexton was by said Court appointed as executor thereof and duly qualified as such and at all times has been and now is the duly appointed, qualified and acting executor of the estate of said Quincey L. Chapman, deceased.

12. That thereafter and on, to-wit, February 25th, 1922, complainant herein duly filed and served its claim as a creditor of the estate of said Quincey D. Chapman (as provided by the laws of the State of Washington), in the sum of Five Thousand Four Hundred Twenty-nine Dollars and ninety cents (\$5,429.90), and then and there and by reason of the fact that said mortgage and note was then in default for payment of interest, declared the whole of the same, both principal and interest, due and payable. That thereafter, and on to-wit, the 22nd day of March, 1922, said Joseph F. Sexton, executor as aforesaid, caused the said claim to be disallowed.

13. That said note and mortgage provided for the allowance of a reasonable attorney's fee to complainant in the event of foreclosure and that the sum of Six Hundred (\$600) Dollars is a reasonable sum to be allowed therefor.

14. That said mortgage contains a provision that in the event said premises do not sell for sufficient to pay the same, together with accumulations of interest and costs, that complainant herein might have and recover a deficiency judgment therefor.

15. That said mortgage provides that the purchaser at the foreclosure sale held thereunder shall be entitled to the possession of said lands during the period of redemption.

16. That said note and mortgage provides that overdue interest and principal shall bear interest at the rate of 10% per annum.

17. That no other action or proceeding has been commenced or is now pending for the collection of said note or foreclosure of said mortgage.

18. That the above named defendants and each of them have or claim to have some right, title, interest, equity or estate in and to the above described premises or some part thereof, but complainant alleges that whatever right, title, estate, lien, interest or equity said defendants or any of them have in or to said premises the same is inferior, subordinate and subsequent to complainant's rights by virtue of said mortgage.

19. That defendants have failed, neglected and refused to pay any part of said principal note, have also failed to pay the interest due thereon January 1st, 1922, or any part thereof and by reason thereof, there is now due and owing to this complainant thereon from the Estate of said Quincy D. Chapman, the sum of Five Thousand Dollars, with interest thereon from January 1st, 1922, at the rate of seven per cent per annum; Three Hundred Fifty Dollars with interest thereon from January 1st, 1922, at the rate of ten per cent per annum, together with complainant's attorney's fees, costs and disbursements herein.

Wherefore, This complainant prays judgment against defendant Joseph F. Sexton, as executor of the estate of Quincy D. Chapman deceased, in the following sums: The sum of Five Thousand (\$5,000) Dollars, with interest thereon from January 1, 1922, at the rate of seven per cent per annum, Three Hundred Fifty (\$350) Dollars, with interest thereon from January 1st, 1922, at the rate of ten per cent per annum, the sum of Six Hundred Dollars, attorney's fees and complainant's costs and disbursements in this action.

7. Complainant further prays that each and all of the above sums be declared a good and valid lien against the premises above described, under and by virtue of said mortgage; that said mortgage be foreclosed and the premises covered thereby ordered sold in the manner provided by law, in accordance with the practise of this Court, the proceeds of said sale to be applied to the payment of (1) the costs and disbursements herein, including costs of sale, (2), to the amount adjudged to be due complainant under said mortgage, including interest and attorney's fees, and in the event the proceed-

of said sale be insufficient to fully pay said judgment in the amount so found due complainant herein, that complainant have personal judgment against defendant, Joseph F. Sexton, as executor of the estate of Quincy D. Chapman, deceased, for any sum then remaining unpaid, and that said executor be directed to pay said judgment out of the assets of the estate of the said Quincy B. Chapman, deceased, all in the manner provided by law.

That by said foreclosure and sale all the right, title and interest of defendants in this action in and to the premises herein described be foreclosed and excluded and each and all of said defendants and all persons claiming under them or any of them, be forever barred, foreclosed, and enjoined from claiming, asserting or exercising any right, title, interest, estate, lien or equity in and to said premises or any part thereof, save the right of redemption provided by law.

That the purchaser at said sale be entitled to possession of said property upon production of the Certificate of Sale therefor from the officer holding such sale.

And for such other and further relief as to the Court may seem equitable, legal and warranted by the facts herein set forth. L. H. Brown, Attorney of Record for Complainant Herein. Lawrence H. Brown, Attorney for Complainant, Post Office Address 801 Old National Bank Bldg., Spokane, Washington.

[File endorsement omitted.]

8

### Exhibit to Bill of Complaint.

This Agreement made and entered into this 19th day of September 1917, by and between J. W. Hays, and Lillie G. Hays, his wife, parties of the first party, Q. D. Chapman, a widower, prior to the year 1910, parts of the second party, Citizens Savings Bank and Trust Company, party of the third party, Witnesseth as follows, to-wit:

That whereas the first parties hereto did on the 1st day of September, 1908, execute and deliver a certain mortgage of that date in favor of M. L. Bevis, covering all of Section Five (5), Township nineteen (19) North Range Twenty-six (26) E. W. M. in Grant County, Washington, to secure the payment of a certain promissory note executed by the first parties hereto of even date with said mortgage in favor of said M. L. Bevis.

And whereas said note and mortgage was duly endorsed and assigned to the Citizens Savings Bank and Trust Company, third parties hereto on the 16th day of September, 1908, by the said M. L. Bevis, which assignment was duly recorded on the 18th day of September, 1908, in Book 28 of Mortgages, page 139, in the office of County Records for Douglas County, Washington, no- Grant County, Washington, transcribed in book 1, of Mortgages, page 68 of Grant County Records.

And whereas said first parties hereto did on the 11th day of October, 1911, transfer by good and sufficient warranty deed to Q. D. Chapman, the second party hereto, an undivided one-half interest in and to said lands subject to the said mortgage.

And whereas, the first parties hereto did on the 17th day of August, 1911, transfer and convey by good and sufficient warranty deed, subject to said mortgage, to said Q. D. Chapman, the other undivided one-half interest in and to the premises above described.

And whereas, the above described mortgage will become due and payable on January 1st, 1918.

And whereas, the said second party hereto is desirous of having the time of payment of said note and mortgage extended from January 1st, 1918, to January 1st, 1923, and each and all of the parties hereto in consideration of the foregoing premises and the mutual covenants and obligations each to the other, it is agreed that the said time of said note and mortgage be and the same is hereby extended to January 1st, 1923, and that the said J. W. Hays and Lillie G. Hays, his wife, remain liable and bound by the said note and mortgage in all the respective terms and provisions, and that the first and second parties and each of them hereto, are hereby given the right and privilege of paying off *an account* of the principal of said note and mortgage, the sum of Five Hundred (\$500) Dollars, or any sum in excess thereof at any interest paying date, and it is further agreed by all the parties hereto that all the other terms, provisions and conditions of the said note and mortgage in and all hereto shall be binding and obligatory upon the respective parties hereto, and upon the said land described herein, and the said mortgage shall remain a lien upon said lands in all particulars and be of the same force and effect as if the time of payment of said note and mortgage were originally made payable on the 1st day of January, 1923, instead of on the 1st day of January, 1918, and that each provision of said note and mortgage and the right to foreclose and enforce payment thereof in default of payment of interest or default in the compliance with the provisions of said mortgage, shall be and remain in full force and effect and unaffected and unimpaired by this extension.

In witness whereof the parties hereto have hereby caused this instrument to be executed in triplicate the day and year first above written. J. W. Hays, Lillie G. Hays, First Parties. Q. D. Chapman, Second Party. Citizens Savings Bank & Trust Company, by A. J. Bailey, President. John T. Ritchie, Secy., Third Party. (Corporate Seal.)

9 STATE OF WASHINGTON,  
*County of Spokane, ss:*

I, A. E. Gallagher, a Notary Public in and for the State of Washington, do hereby certify that on this 3d day of October, 1917, personally appeared before me, J. W. Hays, and Lillie G. Hays, his wife, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

**Answer of Joseph F. Sexton.**

**7**

Given under my hand and official seal this 2d day of October, A. D. 1917. A. E. Gallagher, Notary Public in and for the State of Washington, Residing at Spokane, Wash. [Seal.]

**STATE OF WASHINGTON,**  
*County of Spokane, ss:*

I, A. E. Gallagher, a Notary Public in and for the State of Washington, do hereby certify that on this 3d day of October, A. D. 1917, personally appeared before me Q. D. Chapman, to me known to be the individual described in and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 3d day of October, 1917. A. E. Gallagher, Notary Public in and for the State of Washington, Residing at Spokane, Washington. [Seal.]

**STATE OF VERMONT,**  
*County of Caledonia, ss:*

On this 24th day of September, A. D. 1917, before me personally appeared A. L. Bailey, to me known to be the President, and John T. Ritchie, to me known to be the Secretary of the Corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of the said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written. Donald McGregor, Notary Public in and for the State of Vermont, Residing at St. Johnsbury, Vermont. [Seal.] My commission expires January 31, 1919.

10 In the District Court of the United States for the Eastern District of Washington, Northern Division.

[Title omitted.]

**Answer of Joseph F. Sexton.**

[Filed May 4, 1922.]

Now comes Joseph F. Sexton, executor of the Estate of Quincy D. Chapman, deceased, and for Answer to the Bill of Complaint:

1. That as to the allegations contained in paragraph one of the Bill, that the complainant was or is a corporation, or is organized or existing under the laws of the State of Vermont, or has paid any license fees or complied with any regulations of the State of Vermont with respect to corporations organized therein, or that its

charter and articles are in full force and effect, this defendant has no knowledge or belief as to any of these allegations, and denies the same.

2. That as to the allegations contained in paragraph four of the Bill, that on the — day of ——, 1908, or at any other time, M. L. Bevis for a valuable or any consideration, endorsed, transferred or assigned the said promissory note or the said mortgage to complainant, or that said alleged assignment was recorded, or that complainant at any time has been or is now the owner or holder of said  
11 note or mortgage, or is entitled to any sums due or to become due thereon, this defendant has no knowledge or information sufficient to form a belief, and denies each and every of said allegations.

3. That as to paragraph five of said Bill, this defendant denies that said James W. Hays and Lillie G. Hays on October 11, 1911, or at any other time, made any conveyance to said Quincy D. Chapman of an undivided one-half interest in said lands, or any other interest, and as a consideration for said transfer said Quincy D. Chapman assumed or agreed to pay one-half or any other part of said mortgage indebtedness; but defendant admits that on or about October 11, 1911, said James W. Hays and Lillie G. Hays executed and delivered to Quincy D. Chapman a deed for an undivided one-half interest in said real estate, in consideration of the payment by Quincy D. Chapman of the sum of \$10,309.00, and under an agreement whereby said James W. Hays guaranteed to said Quincy D. Chapman that he should sustain no loss through the purchase of said property and the payment of the said consideration; that said Quincy D. Chapman has sustained the loss of his entire investment with interest thereon from said October 11, 1911, and said real estate is not worth any sum in excess of the mortgage indebtedness, and this defendant has elected to recover from said James W. Hays the loss sustained by him, to-wit, the sum of \$10,309.00 with interest from October 11, 1911, at the legal rate.

4. That as to paragraph six of the Bill, this defendant denies that on August 17, 1917, or at any other time, said James W. Hays and Lillie G. Hays, his wife, or either of them, for a valuable consideration, or at all, made, executed or delivered to Quincy D. Chapman a warranty deed covering all or any of the interest of said Hays and wife in any of said lands, and denies that by the terms of any such deed said Quincy D. Chapman assumed or agreed to pay the said \$5,000.00 mortgage with interest and accumulations thereon, or any part of any such indebtedness, and denies that said Quincy D. Chapman caused any such deed to be filed or recorded at any time;  
12 but this defendant admits that on or about August 17, 1917,  
said James W. Hays and Lillie G. Hays executed an instrument which in form was a warranty deed, for an undivided one-half interest in said real estate and in favor of said Quincy D. Chapman, and caused said deed to be placed of record in the office of the auditor of Grant County, Washington, but this defendant alleges that said deed was in fact a mortgage given as security for indebtedness due

from said James W. Hays and Lillie G. Hays, to said Quincey D. Chapman, and not for the purpose of passing any title to said Quincey D. Chapman.

5. That as to paragraph seven of the Bill, this defendant denies that said James W. Hays and Lillie G. Hays, his wife, have ceased to have any interest in said real estate.

6. That as to paragraph eight of the Bill, this defendant denies that on October 3, 1917, or at any time, said Quincey D. Chapman made or entered into any written or other agreement with complainant, by the terms of which said Quincey D. Chapman agreed to pay the said mortgage indebtedness or any part thereof, or to pay any indebtedness of any nature or kind, or to pay any accumulation of interest thereon, but admits the said Quincey D. Chapman did sign a document as shown by exhibit "A" attached to the Bill.

7. That as to paragraph twelve of the Bill, this defendant admits that complainant on February 25, 1922, served on this defendant its purported claim against the estate of said Quincey D. Chapman, deceased, in the sum of \$5,429.90; and that on March 22, 1922, this defendant rejected and disallowed said claim, but denies each and every other allegation in said paragraph contained.

8. That as to paragraph thirteen of the Bill, this defendant denies that the sum of \$600.00 or any other sum is a reasonable attorney's fee to be allowed.

9. That as to paragraph nineteen of the Bill, this defendant denies that there is now due or owing to complainant from the estate of Quincey D. Chapman the sum of \$5,000.00 with interest from January 1, 1922, at 7% per annum; \$250.00 with interest from January 1, 1922, at 10% per annum, together with complainant's attorney's fees, costs and disbursements herein, and denies that any of said sums are due or owing from said estate.

Having thus made a full answer to all matters and things contained in the Bill this defendant prays that the Bill be dismissed so far as the complainant seeks to recover any money judgment against this defendant, and for his costs in this behalf incurred. R. J. Danson, Jas. A. Williams, Robert W. Danson, Solicitors for said Defendant.

[File endorsement omitted.]

14 In the District Court of the United States for the Eastern District of Washington, Northern Division,

[Title omitted.]

**AMENDED BILL OF COMPLAINT.**

[Filed Aug. 21, 1922.]

To the Hon. Frank H. Ruskin, Judge of the District Court of the District Court of the United States for the Eastern District of Washington, Eastern Division:

The Citizens Savings Bank & Trust Company, a corporation duly organized by and existing under the laws of the State of Vermont, and having its principal place of business at St. Johnsbury in said State, and a citizen of said State, humbly complains against Joseph F. Sexton, as executor of the estate of Quincy D. Chapman, deceased, said Joseph F. Sexton being a citizen of the State of Washington, and residing in Spokane County of said State, and against Millard F. Chapman, a citizen of the State of Michigan and residing in Kalamazoo County of that state, and against Mrs. H. Ferry, a citizen of the State of Ohio, and residing at Kingsville in Ashland County of said State.

And your complainant therefore complains and says:

1. That at all times herein mentioned complainant, Citizens Savings Bank & Trust Company, was and is a corporation, organized and existing under the laws of the State of Vermont, and having its principle office at St. Johnsbury, Vermont, and has paid all license fees to and complied with all regulations of the State of Vermont, with respect to corporations organized therein, and that its charter and articles are in full force and effect.

15 2. That on the 3d day of September, 1908, at Spokane, in the State of Washington, James W. Hays and Lillie G. Hays, his wife, for a valuable consideration to them to be paid, and which was thereafter paid, made, executed and delivered to M. L. Bevis, their certain principal first mortgage note, dated September 1st, 1908, in the sum of Five Thousand (\$5,000) Dollars, together with certain interest coupons attached thereto.

3. That thereafter, and on to-wit the third day of September, 1908, and in order to secure the payment of the note set forth in the preceding paragraph hereof, said James W. Hays and Lillie F. Hays, his wife, for a valuable consideration to them to be paid, and which was thereafter paid, duly executed and delivered to said M. L. Bevis, their certain real estate mortgage, dated September 1, 1908, by which they did grant, bargain, sell and convey to said M. L. Bevis, the following described real estate, of which they were then the owners and in possession situated in Douglas (now Grant) County, Washington, and which said real estate was and is within the above entitled judicial district of this Court, to-wit:

All of section Five (5) in Township Nineteen (19) North Range Twenty-six (26) E. W. M.

That said mortgage was on September 3d, 1908, duly acknowledged and thereafter and on to-wit the 9th day of September, 1908, recorded in the office of the auditor of said Douglas County, Washington, in Book "U" of Mortgages, page 530."

4. That thereafter and on to-wit the 4th day of September, 1908, said M. L. Bevis duly endorsed and transferred said promissory note by endorsement of same "without recourse," and delivered the same to Citizens Savings Bank and Trust Company, the complainant herein, and thereafter and on, to-wit, September 16th, 1908, duly assigned said mortgage to said Citizens Savings Bank and Trust Company, the complainant herein, which said assignment of mortgage was thereafter and on, to-wit September 18, 1908, filed for record in the office of the Auditor of Douglas County (now Grant County), Washington.

That complainant herein, Citizens Savings Bank & Trust Company, at all times since the making of such note and mortgage, has been and now is the owner and holder thereof, and entitled to all sums which became due and are due thereon; That the payee and transferre of said note and mortgagee and transferror of said mortgage, to-wit, M. L. Bevis, at all times herein mentioned was and still is a citizen of the State of Washington, residing in Spokane County, in said State; That he, the said M. L. Bevis, was, during the entire months of August and September, 1908, and for a number of years prior thereto, a member of the firm of Bevis Bros., a co-partnership, and the active managing head thereof, engaged in the mortgage loan brokerage business at Spokane, Washington; That on September 3d, 1908, said James W. Hays and Wife, made written application to said M. L. Bevis and Bevis Bros. for a loan of Five Thousand (\$5,000) Dollars on the lands above described, and in such application constituted said Bevis Bros. and M. L. Bevis their agents for the purpose of procuring such loan; That said Hays and wife agreed to pay to said M. L. Bevis and Bevis Bros. a commission of Two Hundred and Fifty (\$250) Dollars in the event the said loan was procured; That at the time of the making of such note and mortgage said Bevis had obtained from complainant herein its agreement to loan to the said Hays and wife, on said mortgage security, the said sum of Five Thousand (\$5,000) Dollars; That in taking, endorsing, assigning and transferring said note and mortgage and making settlement thereon with said Hays and wife, said M. L. Bevis acted as the mere broker and agent of said Hays and wife to procure said loan; That all monies paid to the said Hays and wife in settlement of said loan were the monies of this complainant; That said Bevis never advanced any money thereon to said Hays and wife or either of them and never became a creditor of the said Hays and wife or either of them; that said Bevis never has had any beneficial interest in said notes or mortgage, but the beneficial owner thereof at all times was and still is your complainant.

5. That thereafter and on, to-wit, the 11th day of October, 1911,

17. said James W. Hays and Lillie G. Hays, his wife, for a valuable consideration, made executed and delivered to said Quincy D. Chapman, a warranty deed to an undivided one-half interest in and to said lands subject to complainant's said mortgage; For Five Thousand Dollars, said deed being by said Chapman filed for record and recorded in Book 6, page 494, records of Grant County, Washington, and that as a part of the consideration for said transfer, said Quincy D. Chapman assumed and agreed to pay one-half of complainant's said mortgage.

6. That thereafter and on to-wit the 17th day of August, 1917, said James W. Hays and Lillie G. Hays, his wife, for a valuable consideration, made executed and delivered to said Quincy D. Chapman a warranty deed, covering all of the interest of said Hays and wife in and to said lands, by the terms of which deed said Quincy D. Chapman assumed and agreed to pay the said \$5,000.00 mortgage heretofore described, together with all interest and accumulations thereon, and which said deed said Quincy D. Chapman caused to be filed and recorded in the office of the Auditor of Grant County, Washington, in Book 19 of Deeds, at page 174, on September 7, 1917.

7. That said James W. Hays and Lillie G. Hays, his wife, have ceased to have any interest in the said above described real estate or any part thereof.

8. That thereafter and on to-wit the 3d day of October, 1917, said Quincy D. Chapman for a valuable consideration made and entered into a written agreement with this complainant by the terms of which said mortgage was extended to January 1, 1923, and by the terms of which Quincy D. Chapman agreed to pay the same and the whole thereof, together with all accumulations of interest thereon (a copy of which instrument of extension is hereto attached, marked "Exhibit A" and made a part of this Bill of Complaint.)

9. That by the terms of said mortgage and said extension agreement, it was provided that in the event of default in the payment of the principal of interest of said note and mortgage, after the same should become due and payable, the holder thereof might declare the whole, both principal and interest, due and payable, without further notice and might immediately bring suit to foreclose said mortgage.

18. 9. That the said Quincy D. Chapman died on or about the 21st day of December, 1921, testate, and by the terms of his will, defendants Millard F. Chapman and Mrs. H. Ferry, are sole devisees of said Quincy D. Chapman, deceased, and by virtue thereof, have or claim to have some right, title, estate, lien or equity in or to the property described in this Bill of Complaint, and are necessary and indispensable parties defendant to this action.

10. That thereafter and about the — day of January, 1922, said will was submitted to probate in the Superior Court of Spokane County, in the State of Washington, and Joseph F. Sexton was by said Court appointed as executor thereof and duly qualified as such and at all times has been and now is the duly appointed and acting executor of the estate of said Quincy L. Chapman, deceased.

11. That thereafter and on, to-wit: February 25th, 1922, complainant herein duly filed and served its claim as a creditor of the

estate of said Quincy D. Chapman (as provided by the laws of the State of Washington), in the sum of Five Thousand Four Hundred Twenty-nine Dollars and ninety cents (\$5,429.90), and then and there by reason of the fact that said mortgage and note was then in default for payment of interest, declared the whole of the same, both principal and interest, due and payable. That thereafter, and on, to-wit, the 22d day of March, 1922, said Joseph F. Sexton, executor aforesaid, caused the said claim to be disallowed.

12. That said note and mortgage provided for the allowance of a reasonable attorney's fee to complainant in the event of foreclosure and that the sum of Six Hundred (\$600) Dollars is a reasonable sum to be allowed therefor.

13. That said mortgage contains a provision that in the event said premises do not sell for sufficient to pay the same, together with accumulations of interest and costs, that complainant herein might have and recover a deficiency judgment therefor.

14. That said mortgage provides that the purchaser at the foreclosure sale held thereunder shall be entitled to the possession of said lands during the period of redemption.

15. That said note and mortgage provides that overdue interest and principal shall bear interest at the rate of ten percent per annum.

16. That no other action or proceedings has been commenced or is now pending for the collection of said note or foreclosure of said mortgage.

17. That the above named defendants and each of them have or claim to have some right, title, interest, equity, or estate in and to the above described premises or some part thereof, but complainant alleges that whatever right, title, estate, lien, interest, or equity said defendants or any of them have in or to said premises the same is inferior, subordinate and subsequent to complainant's rights by virtue of said mortgage.

18. That defendants have failed, neglected and refused to pay any part of said principal note, have also failed to pay the interest due thereon January 1st, 1922, or any part thereof and by reason thereof there is now due and owing to this complainant thereon from the estate of said Quincy D. Chapman, the sum of Five Thousand Dollars, with interest thereon from January 1st, 1922, at the rate of seven percent per annum; Three Hundred and Fifty Dollars with interest thereon from January 1st, 1922, at the rate of ten percent per annum together with complainant's attorney's fees, costs and disbursements herein.

Wherefore, This complainant prays judgment against defendants Joseph F. Sexton, as executor of the estate of Quincy D. Chapman, deceased in the following sums: The sum of Five Thousand (\$5,000) Dollars, with interest thereon from January 1, 1922, at the rate of seven percent per annum, Three Hundred and Fifty (\$350) Dollars, with interest thereon from January 1st, 1922, at the rate of ten percent per annum, the sum of six Hundred (\$600) Dollars, attorney's fees, and complainant's costs and disbursements in this action.

20 Complainant further prays that each and all of the above sums be declared a good and valid lien against the premises above described, under and by virtue of said mortgage; That said mortgage be foreclosed and the premises covered thereby ordered sold in the manner provided by law and in accordance with the practice of this Court, the proceeds of said sale to be applied to the payment of (1) the costs and disbursements herein, including costs of sale, (2) to the amount adjudged to be due complainant under the said mortgage, including interest and attorney's fees, and in the event the proceeds of said sale be insufficient to fully pay said judgment in the amount so found due complainant herein, that complainant have personal judgment against defendant, Joseph F. Sexton, as executor of the estate of Quiney D. Chapman, deceased, for any sum then remaining unpaid, and that said executor be directed to pay said judgment out of the assets of the estate of the said Quiney D. Chapman, deceased, all in the manner provided by law.

That the purchaser at said sale be entitled to possession of said property upon production of the Certificate of Sale therefor, from the officer holding such sale.

And for such other and further relief as to the Court may seem equitable, legal and warranted by the facts herein set forth. L. H. Brown, Attorney of Record for Complainant Herein. Lawrence H. Brown, Attorney for Complainant; Post Office Address 801 Old National Bank Bldg., Spokane, Washington.

[File endorsement omitted.]

21 In the District Court of the United States for the Eastern District of Washington, Northern Division,

[Title omitted.]

### Answer to Amended Bill of Complaint.

[Filed Aug. 10, 1922.]

Come now the defendants and for answer to the amended bill of complaint:

1. Admit the allegations in Paragraph 2 of the bill, except that defendants deny that the said note was made, executed and delivered on September 3, 1908, or at any other time than September 1, 1908.

2. That as to the allegations contained in Paragraph 4 of the bill, that said M. L. Bevis on the 4th day of September, 1908, endorsed or transferred said promissory note, or delivered the same at said time to complainant, these defendants have no knowledge or information sufficient to form a belief, and deny the same, except that they admit the said note was at some subsequent time endorsed and transferred by said M. L. Bevis; that as to the allegations in said paragraph that complainant at all times since the making of said note and mortgage has been the owner and holder thereof, or entitled to any sums which became due and are due thereon, and that on Sep-

tember 3, 1908, James W. Hays and wife made written application to M. L. Bevis, or Bevis Bros., or either of them, for a loan of \$5,000.00 on the land described in the bill or in any such application constituted Bevis Bros., M. L. Bevis, or any of them, their agents for the purpose of procuring such loan, or that said Hays and wife agreed to pay M. L. Bevis, or Bevis Bros., a commission of \$250.00 in the event a loan was procured, and the allegation that at the time of the making of such note and mortgage said Bevis had obtained from complainant its agreement to loan to said Hays and wife on such mortgage security, or otherwise, the sum of \$5,000.00, or any other sum, and the allegation that in taking, endorsing, assigning and transferring said note and mortgage, or in doing any of said things, or making settlement thereof with Hays and wife said M. L. Bevis acted as the mere broker and agent of Hays and wife to procure said loan, or otherwise, or that all moneys paid to said Hays and wife in settlement of said loan were the moneys of complainant, or that Bevis never advanced any money thereon to said Hays and wife, or either of them, and never became a creditor of said Hays and wife, or either of them, or that the said Bevis never had any beneficial interest in said note and mortgage, but the beneficial owner thereof at all times was, and still is, complainant, these defendants deny each and every of said allegations.

3. That as to the allegations contained in Paragraph 5 that on October 11, 1911, or at any other time said Quiney D. Chapman, as a part of the consideration for the transfer to him by Hays and wife of an undivided half interest in the said lands, or otherwise, assumed and agreed to pay one-half of complainant's mortgage, these defendants deny each and every of said allegations.

4. That as to the allegations contained in paragraph 6 of the bill that on August 17, 1917, or any other time, said Hays and wife executed or delivered to said Quiney D. Chapman a warranty deed covering all or any of the interests of Hays and wife in or to said lands, and the further allegation that by the terms of such deed said Chapman assumed, or agreed to pay, said mortgage, or any part thereof, together with all or any interest or accumulations thereof, or that said Chapman caused any such deed to be filed or recorded in the office of the Auditor of Grant County, or elsewhere, these defendants deny each and every of said allegations, except that they admit that an instrument in the form of a deed was executed by said Hays and wife in favor of the said Chapman, and was filed by them,

which deed, however, was intended to be as security for an indebtedness due from Hays and wife to said Chapman.

5. That as to the allegations contained in paragraph 7 that said James W. Hays and Lillie G. Hays, or either of them have ceased having interest in said real estate, these defendants deny the same.

6. That as to the allegations contained in paragraph 8 of the bill to the effect that said Quiney D. Chapman, by written agreement of date October 3, 1917, or of any other date, or in any other manner, agreed to pay the said mortgage debt, or any part thereof, or any accumulations of interest thereon, these defendants deny each

and every of said allegations; but do admit that said Chapman executed an instrument as shown by Exhibit "A" attached to the bill.

7. That as to the allegations contained in Paragraph 12 of the bill that \$600.00 is a reasonable attorney's fee, these defendants deny each and every of said allegations.

8. That as to the allegations contained in paragraph 18 of the bill that there is due, or owing, the complainant from the estate of Quiney D. Chapman the sum of \$5,000.00, with interest from January 1, 1922, or any other sum, or any amount for attorney's fees, or any amount on account of interest that was matured on January 1, 1922, these defendants deny each and every of said allegations.

Further answering said bill as so amended, and by way of motion to dismiss, these defendants allege:

1. That the defendant Millard F. Chapman is now and was at all the times mentioned in the bill, a resident and citizen of the State of Michigan, and the defendant Mrs. H. Ferry was at all the said times, a resident and citizen of the State of Ohio, and the said Joseph F. Sexton, executor, and said Quiney D. Chapman were at all the said times residents and citizens of the State of Washington; that at the time when said note and mortgage were executed M. L. Bevis, the original payee, was a resident and citizen of the State of Washington, and at all times since has been a resident and citizen of the State of Washington.

2. That the said mortgage note referred to in the bill was and is non-negotiable in form.

24 3. That at the time of the commencement of this action the controversy was not between citizens of different states within the contemplation of the statutes of the United States and this court has never acquired jurisdiction over the controversy.

Having thus made a full answer to all matters and things contained in the bill, these defendants pray that the bill be dismissed and for their costs in this behalf incurred. Jas. A. Williams, R. J. Danson, Robert W. Danson, Solicitors for Defendants.

[File endorsement omitted.]

25 In the District Court of the United States for the Eastern District of Washington, Northern Division.

In Equity. No. 3980.

[Title omitted.]

**Appellant's Statement of Facts and Evidence.**

[Lodged Feb. 13, 1923.]

The issues in this action came on for trial before the Honorable Frank H. Rudkin, Judge of the District Court for the Eastern District of Washington, Northern Division, at Spokane, in said Dis-

frict, on the 25th day of October, 1922, before the Court without a jury. Complainant, by its counsel, opened the case, whereupon the following evidence was introduced:

[File endorsement omitted.]

26 GILBERT E. Woods, a witness produced on behalf of complainant, being duly sworn, testified on direct examination as follows:

I am President of Citizens Savings Bank and Trust Company, complainant herein, and have been connected with them for thirty-two years. We had had business relations with Bevis and Bevis Brothers prior to the Hays transaction. We had bought loans from them, as we did the Hays loan, but they were not our agents.

The history of the Hays loan is this: On September 3, 1908, we received the telegram from Bevis Brothers, (marked plaintiff's exhibit 1), and on the same day telegraphed our reply to the same, to the effect that we would accept the loan, and at the same time wrote Bevis Bros a letter, confirming the telegram of September 3d. Bevis Bros, wrote us the letter (marked plaintiff's exhibit 2) with which was inclosed a copy of the telegram (plaintiff's exhibit 1) which letter was received by us in the usual course of mail, probably about September 9th, 1908. Also inclosed with that Exhibit two, was the application for loan (Plaintiff's exhibit 4). On September 4th, 1908, Bevis wrote us the letter marked plaintiff's exhibit 3 and on September 16th 1908 wrote us the letter (plaintiff's exhibit 5) inclosing with same the original mortgage, duly recorded (plaintiff's exhibit 6). On September 28, 1908, Bevis wrote us a letter (plaintiff's exhibit 7) with which was inclosed an assignment (plaintiff's exhibit 1A) of the mortgage referred to, duly executed by M. L. Bevis, and previously recorded in the office of the Auditor of Douglas, now Grant County, Washington. This was received by us in the usual course of mail. I do not have the assignment and have made diligent search for it, but cannot find it, and do not know where it is.

Plaintiff's exhibit 8 is the note of Hays and wife for \$5,000.00. This was received by us about September 9, 1908, it being attached to a draft on us by Bevis Bros. (Plaintiff's exhibit 9), for \$3,694.94, dated September 4, 1908. This draft we paid on presentation about September 9th. This difference between the amount of the draft

and the face of the loan was accounted for by a loan of \$1,273.00, which we had paid Bevis Bros, for, and which we did not accept, so that Bevis Bros, had on hand at the time of making draft on us \$1,365.06.

The Citizens Savings Bank and Trust Company at all times since the making of said note and mortgage has been and still is the owner and holder thereof. We never loaned any money to Bevis or Bevis Bros, and the money used to take up the draft was the money of Citizens Savings Bank and Trust Company.

Complainant's exhibit 15 is the envelope on which was kept the record of this loan by the Citizens Savings Bank and Trust Company. The initials on the bottom of the envelope are the initials of the respective directors approving the loan.

Our relations with Bevis Bros. at the time was this: They would find a loan, then wire us that they had it, and could make it. If we accepted it, they would complete the loan and draw on us, then settle with the borrower. I do not understand that they made any investments for us or consummated any loans until they got our money. As to their making an investment, they would do the same as in this Hays case. They would submit wire or application, which we would accept or reject. If we accepted they would go ahead and consummate the transaction. If we agreed to take the loan, we would complete it, as far as we were concerned.

The directors' initials on the envelope, plaintiff's exhibit 15, was our usual and customary way of having a loan approved by the Directors.

On cross-examination, Gilbert E. Woods testified as follows:

The Citizens Savings Bank and Trust Company never maintained any office for the transaction of business in the State of Washington; never had any agent in the State of Washington, representing it for the purpose of making loans; never maintained any money in the State of Washington for investment purposes; never passed after

resolution constituting M. L. Bevis or Bevis Bros. as our  
28 agents; never gave Bevis or Bevis Bros. any authority to make loans which our Trust Company was obligated to take and our dealings with Mr. Bevis or Bevis Bros. were that as we had money to invest we would buy securities that were offered us and which appealed to us as being good investments, the question of security being passed upon by us. We had arrangements with Bevis that if, after we bought a loan we found it unsatisfactory, he would repurchase.

So far as our dealings with Bevis were concerned, he would make his investments and would send us on the application, and if we saw fit to take it, we would wire him or write him.

By Mr. Williams, of counsel for defendants:

Q. "Otherwise he would have to look elsewhere for the purchase?"

By Mr. Woods:

A. "He probably would."

The \$1,300.00 used for paying on the Hays note and mortgage was a loan we had previously purchased from Bevis and paid \$1,300.00 for it, and later, when we came to see the papers, we were not satisfied and required him to take it up and he did so, by crediting us on this Hays loan.

By Mr. Williams:

Q. "In answer to a question by Mr. Porter you said that the Citizens Savings Bank & Trust Company has been the owner of this note and mortgage at all times since its date. What you mean is that since you acquired it by this purchase from Bevis or Bevis Bros., is it not?"

By Mr. Woods:

A. "I suppose it was ours from the time we paid for it."

29 M. L. BEVIS, a witness for complainant, being duly sworn, testified on direct, as follows:

In September, 1908, I was a member of the firm of Bevis Bros., engaged in the farm mortgage loan business at Spokane, Washington, and I was the general manager of the Spokane office. We were engaged in selling, not buying real estate mortgage loans. We were what is known as mortgage loan brokers.

I recognize plaintiff's exhibit four. It is the original application to Bevis Bros. for the loan, was signed by Mr. Hays on September 3, 1908. The farm report attached is a part of the same instrument and the initials "OK MLB" are my own initials in my own handwriting, and the signature of Bevis Bros. was made by me.

Plaintiff's exhibit 6 is the original mortgage given by Hays and wife to M. L. Bevis.

Exhibit 8 is the original mortgage note from which the coupons have been detached.

Exhibit 9 is a draft and bears my signature.

Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 15, 1A, and 6A were offered and received in evidence.

I remember this loan to Hays. The facts with respect to the payment by the Citizens to us are as follows:—We took the original note (plaintiff's Exhibit 8) with sight draft (plaintiff's exhibit 9) attached to the Old National Bank of Spokane and they gave us credit for it on account, and we used the money. I do not have a distinct recollection as to when we paid the money over to Hays. We had so much business those days that I don't remember, but we paid him the money.

Plaintiff's Exhibit 6A is the original statement that we furnished Mr. Hays when we closed the account. It bears my signature. I do not recollect the delivery of it to Mr. Hays. I think my chief clerk probably delivered it to him. I guess it was delivered on or about the day it bears date. Mr. Hays' office at that time was in the same building with us in Spokane.

30 The loan was made about September 3d. We usually dated the note the first of the month for a matter of interest convenience, and that was done in this case, so that the date September 1st, was merely a matter of convenience.

On cross-examination, Mr. Bevis testified as follows:

I started in the mortgage loan business in 1883, and we have done a large business.

Q. "And when you took a mortgage, when you were making these mortgages, were you making them for yourselves, or were you making them for somebody else?"

A. We were making them to sell again; always sold those things.

When we took them we sometimes knew to whom we would sell them and sometimes not. We had some money to carry on our business, but we usually kept it pretty well invested. We always had a good bank account. When we took a mortgage—got a mortgage and note—we would offer it for sale to three or four and sometimes half a dozen parties or persons. That could be done either by telegram or letter. When I took this mortgage and note and application I did not know then whether the Citizens Savings Bank and Trust Company would buy it of us or not.

I wired the Citizens Savings & Trust Company on September 3d, 1908 (plaintiff's Exhibit 1), and it was replied to by the Citizens by a wire received by me on the fourth.

The money we paid Mr. Hays on account of this loan came out of our general bank account, and the proceeds of the draft drawn on the Citizens Savings Bank and Trust Company went into our general account.

In all cases Bevis Bros. personally made out their own checks and the borrower did not know how we handled his money.

We did not have any arrangement with Mr. Hays that we were going to sell the mortgage and note, but he must have known I had to sell these loans again.

31 When we took the note and mortgage, we handled it as we saw fit and there was no agreement between us and Mr. Hays that the payment to him was to be dependent on whether we sold it or did not sell it.

Mr. Williams:

Q. "I call your attention to Exhibit 6A I believe it is. In that I notice that in making settlement with Mr. Hays, there was one check for \$1,000, another for \$1,000 and one for \$2,752.00. How did it happen that you gave that to Hays in several checks?"

Bevis:

A. "Well, we probably wanted a few days to satisfy ourselves in regard to the title before we would pay out all of the money. There might have been some prior loan, or judgment, or taxes, or something of that kind."

I can tell from the numbers on the checks to Hays that the payments were made on different dates. There was perhaps a difference of a week between the first one and the last one. We always wanted a little time to see if the title was good.

J. W. HAYS, a witness for complainant, being duly sworn, testified as follows, on direct examination:

I, with my wife, made the notes and mortgage in question in September, 1908. It was signed and acknowledged on September 3d. I received statement marked plaintiff's exhibit 6; as I remember it, I received it on September 21st, the day it bears date. The \$250.00 item in there for commission was the amount we had agreed upon and it was deducted. I received \$1,000.00 on September 5th, 1908; on September 17, 1908, I received another thousand and on September 22d, 1908, the balance of \$2,752.51.

32 The cause was then summed up by the respective counsel and submitted to the Court, and the Court thereafter, and on November 15, 1922, made and entered its order, dismissing said cause for want of jurisdiction.

In United States District Court,

#### **Order Settling Statement of Evidence.**

The foregoing case contains all of the evidence given and received at the trial of said action, material to the determination of this appeal and the undersigned, acting District Judge of the United States, for the Eastern District of Washington, Northern Division, upon due notice and at the request of counsel for the appellant, has settled and signed this case, to the end that the same may be made a part of the record herein this 16 day of March, 1923. Jeremiah Neterer, United States District Judge.

33 In the District Court of the United States for the Eastern District of Washington, Northern Division.

[Title omitted.]

#### **Order of Dismissal.**

[Filed Nov. 11, 1922.]

This cause came on regularly for trial heretofore, the complainant, Citizens Savings Bank & Trust Company, a corporation, appearing by its solicitor L. H. Brown, and the defendants, Joseph F. Sexton, as Executor of the Estate of Quincy D. Chapman, Deceased, Millard F. Chapman and Mrs. H. Ferry, appearing by their solicitor Jas. A. Williams and thereupon the complainant and defendants presented their evidence and rested, and the Court having heard the arguments of counsel and having heretofore filed its opinion ordering the action dismissed for want of jurisdiction and being now advised in the premises,

It is ordered, That this action be and the same is dismissed for want of jurisdiction of this Court to entertain or determine this case

**Petition for and Order Allowing Appeal.**

and that this dismissal be without prejudice to the institution of any other action.

Done in open Court this 15th day of November, 1922. Frank H. Rudkin, District Judge.

[File endorsement omitted.]

34 In the District Court of the United States Within and for the Eastern District of Washington, Northern Division,

Equity. No. 3980.

[Title omitted.]

**Petition for Allowance of Appeal.**

[Filed Feb. 6, 1923.]

The above named appellant, Citizens Savings Bank and Trust Company, feeling aggrieved by the judgment and decree of the United States District Court, for the Eastern District of Washington, Northern Division, rendered on the fifteenth day of November, 1922, dismissing the above entitled cause for want of jurisdiction, does hereby appeal from said decree of the said United States District Court to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith.

The matter in controversy in said action and on said appeal exceeding the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs, the cause is one in which an appeal to the Supreme Court of the United States is a matter of right.

Wherefore the appellant prays that an appeal be allowed it in the above entitled cause and that a citation be issued as provided by law and that a transcript of the record and proceedings in said cause including any agreed statement on file in the office of the clerk of said district court, with all things concerning the same, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, D. C., in order that the errors complained of in the

assignment of errors herein filed by the appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States. Lawrence H. Brown, Solicitor for Appellant.

In United States District Court.

**Order Allowing Appeal.**

[Filed Feb. 6, 1923.]

It is hereby ordered that the appeal prayed for by the above named appellant from the order of the United States District Court dismissing the above entitled cause for want of jurisdiction be allowed

to the Supreme Court of the United States, and that a certified transcript of the record and proceedings in said cause, including any agreed records of the statement of facts, filed therein, together with the decree of the United States District Court be certified and transmitted to the Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of Five Hundred Dollars.

Dated, this 7 day of February, 1923. Jeremiah Neterer, Presiding U. S. District Judge for the Eastern District of Washington, Northern Division.

[File endorsement omitted.]

33 In the District Court of the United States Within and for the Eastern District of Washington, Northern Division.

[Title omitted.]

### Assignment of Errors.

[Filed Feb. 6, 1923.]

Now comes the Citizens Savings Bank and Trust Company, a corporation, the complainant and appellant in the above entitled cause and files the following assignment of errors:

1. That the District Court of the United States for the Eastern District of Washington, Northern Division, erred in holding that M. L. Bevis was not a mere "nominal holder" of the note and mortgage assigned by him to the complainant and appellant, Citizens Savings Bank & Trust Company, and sought to be foreclosed by this action, and in holding that said Bevis had a beneficial interest therein or right of action thereon.

2. That the District Court of the United States for the Eastern District of Washington, Northern Division, erred in dismissing the suit.

3. That the District Court of the United States for the Eastern District of Washington, Northern Division, erred in dismissing the suit for lack of jurisdiction.

4. That the District Court of the United States for the Eastern District of Washington, Northern Division, erred in rendering a judgment dismissing said cause for want of jurisdiction on the facts found.

37 & 38 5. That the District Court of the United States for the Eastern District of Washington, Northern Division erred in not retaining jurisdiction as to appellee, Joseph F. Sexton, as executor of the estate of Quiney D. Chapman, deceased, he having appeared generally by filing his answer to appellant's Bill of Complaint, waiving objection to jurisdiction, and thus investing the Court with jurisdiction over him.

6. That the District Court of the United States for the Eastern District of Washington, Northern Division, erred in holding that

said Bevis Bros., were not the agents of J. W. Hays and wife, the makers of said note and mortgage, in negotiating with complainant, Citizens Savings Bank & Trust Company for the loan secured by the note and mortgage set forth in complainant's (appellant's) Bill of Complaint in this cause.

7. That the District Court of the United States for the Eastern District of Washington, Northern Division, erred in holding that the requisite diversity of citizenship did not exist between appellant, Citizens Savings Bank and Trust Company and appellees, Joseph F. Sexton, as executor, Millard F. Chapman, and Mrs. H. Ferry, by virtue of execution and delivery of the original written agreement between Citizens Savings Bank and Trust Company, appellant, and Quincy D. Chapman, now deceased (and now represented by his executor, Joseph F. Sexton) in which said written agreement M. L. Bevis was not a party, but in which the original obligors and obligees were residents of different states, wherein and whereby said Quincy D. Chapman, now deceased, agreed to assume and did assume and agree to pay, for a valuable consideration, certain stipulated sums, representing the unpaid balance of the note and mortgage set out in appellant's Bill of Complaint in this cause. Lawrence H. Brown, Solicitor for Appellant.

[File endorsement omitted.]

**39 & 40** In the District Court of the United States Within and for the Eastern District of Washington, Northern Division,

[Title omitted.]

#### Citation on Appeal.

[Filed Feb. 8, 1923.]

**UNITED STATES OF AMERICA,**  
*Ninth Circuit:*

To Joseph F. Sexton, as executor of the estate of Quincy D. Chapman, deceased, Millard F. Chapman, and Mrs. H. Ferry, Greeting:

You and each of you are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, within sixty days after the date of this citation, pursuant to an order allowing an appeal filed and entered in the Clerk's Office of the District Court of the United States, for the Eastern District of Washington, Northern Division, from a final decree, signed, filed and entered on the fifteenth day of November, 1922, in that certain suit being in equity No. 3980, wherein the Citizens Savings Bank and Trust Company is plaintiff and appellant and you are defendants and appellees, to show cause, if any there by, why the decree rendered against the

said appellant as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Jeremiah Neterer, United States District Judge holding term for the Eastern District of Washington, and the seal of the said United States District Court this 8th day of February, 1923. Jeremiah Neterer, United States District Judge, acting for the Eastern District of Washington, Northern Division. [Seal of the United States District Court, Eastern District of Washington.]

41 [File endorsement omitted.]

42 In the District Court of the United States Within and for the Eastern District of Washington, Northern Division.

In Equity. No. 3980.

[Title omitted.]

**Appeal Bond.**

[Filed Feb. 10, 1923.]

Know all men by these presents That we, Citizens Savings Bank and Trust Company, a corporation, organized and existing under and by virtue of the laws of the State of Vermont, of St. Johnsbury, Vermont, as principal, and National Surety Company, of New York, a Corporation, organized and existing under and by virtue of the laws of the State of New York, and authorized to act as surety and to do business in the State of Washington, as Surety, are held and firmly bound unto Joseph F. Sexton, as executor of the estate of Quincy D. Chapman, deceased, Millard F. Chapman and Mrs. H. Ferry, appellees above named, in the full and just sum of Five Hundred (\$500) Dollars, for the payment of which well and truly to be made we hereby bind our, and each of our executors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Spokane, Washington, this 9th day of February, 1923.

Whereas the appellant above named has duly appealed from the final Decree and Order of Dismissal herein to the Supreme Court of the United States, and

43 Whereas the above entitled Court fixed the amount of the bond to be given by said appellant on its appeal in the sum of Five Hundred (\$500) Dollars.

Now therefore, if the appellant shall prosecute its appeal to effect, and if it fails to make its plea good, shall answer all costs, then this obligation shall be null and void, otherwise to remain in full force and effect. Citizens Savings Bank & Trust Company. By L. H.

Brown, Its Agent and Attorney. National Surety Company, James A. Brown, Resident Vice President. G. B. Ferguson, Resident Asst. Secretary.

The foregoing bond and the surety therein is approved this 12 day of February, 1923. Jeremiah Neterer, Acting United States District Judge for the Eastern District of Washington, Northern Division.

O. K. as to signatures and amount. Danson, Williams & Danson, Solicitors for Defendants.

[File endorsement omitted.]

44 In the District Court of the United States Within and for the Eastern District of Washington, Northern Division.

Equity. No. 3980.

[Title omitted.]

**Notice of Filing of Appellants' Statement of Facts and Evidence**

[Filed Feb. 13, 1923.]

To the above-named appellees and to R. J. Danson, J. A. Williams and R. W. Danson, your counsel:

You and each of you are hereby notified that appellant above named has filed with the Clerk of the above Court the attached statement of facts and evidence for use on appeal, and that on Monday, February 26th, 1923, at Ten o'clock A. M., he will present the same to the Judge of the above entitled Court at the Federal Court Room in Spokane, Washington, for approval by the Court.

Dated this 13th day of February, 1923. Lawrence H. Brown,  
Solicitor for Appellant.

[File endorsement omitted.]

45 In the District Court of the United States for the Eastern District of Washington, Northern Division.

In Equity. No. 3980.

[Title omitted.]

**Praecipe for Record on Appeal.**

[Filed Feb. 13, 1923.]

To the Clerk of the above entitled Court:

Please prepare and certify forthwith the following as the portions of the record in this case to be incorporated in the transcript on appeal:

1. Bill of Complaint filed April 15, 1922.
2. Answer of Joseph F. Sexton, executor, filed May 4, 1922.
3. Bill of Complaint as amended, filed August 21, 1922, less Exhibit A attached.
4. Answer to Bill of Complaint as amended, filed August 10, 1922.
5. Plaintiff's exhibits, 1, 2, 3, 4, 5, 6, 7, 8, 9, 15, 1A and 6A.
6. Statement of facts and evidence.
7. Decree dismissing case for want of jurisdiction, dated November 15th, 1922.
8. Petition for allowance of appeal and order allowing appeal, filed February 6, 1923.
9. Appellant's assignment of errors, filed February 6, 1923.
10. Citation on appeal, filed February 8, 1923.
11. Appellant's bond on appeal.
12. Notice of filing statement of facts and evidence.
13. Praecipe for record.
14. Acceptance of service.
15. Memorandum Opinion of Judge Rudkin.  
Lawrence H. Brown, Solicitor for appellant.

[File endorsement omitted.]

- 46 In the District Court of the United States within and for the Eastern District of Washington, Northern Division,

In Equity, No. 3890,

[Title omitted.]

### Acceptance of Service.

[Filed Feb. 13, 1923.]

Service of the Citation on Appeal of the above entitled cause from the judgment and decree of the District Court of the United States for the Eastern District of Washington, Northern Division, to the Supreme Court of the United States, and the praecipe for record on appeal of said cause, and the receipt of copies of the petition for the allowance of the appeal, order allowing appeal, appellant's proposed statement of facts and evidence, and Notice of Presentment of same for approval, the assignment of errors, and the appeal bond for the appeal of said cause, is hereby admitted on this 13th day of February, 1923. Jas. A. Williams, Of Counsel for Appellees.

[File endorsement omitted.]

- 47 In the District Court of the United States for the Eastern District of Washington, Northern Division,

[Title omitted.]

### Memorandum Opinion.

[Filed Nov. 10, 1922.]

L. H. Brown, Attorney for the Plaintiff,

Danson, Williams & Danson, Attorneys for the Defendants.

RUDKIN, *District Judge*: This is a suit by an assignee to foreclose a mortgage and for a deficiency judgment against the grantee of the mortgaged premises, who assumed the mortgage debt. At the threshold of the case the plaintiff is confronted with the objection that the court is without jurisdiction. Section 24 of the Judicial Code provides:

"No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment has been made."

Jurisdiction in this case rests on diversity of citizenship, and inasmuch as the original parties to the mortgage were all citizens of this

state the presumption is against jurisdiction, and the facts giving it must be clearly and positively averred and proved.

Commercial Trust Co. v. Laurens County, 267 Fed. 901.

It has been repeatedly held that this limitation of jurisdiction of United States Courts has no application where the payee named in the note never had any beneficial interest therein or right of action thereon, but acted merely as an agent for the real party in interest.

- 48 Holmes v. Goldsmith, 147 U. S. 150.  
Wachusett National Bank v. Sioux City Stove Works, 56 Fed. 321.  
Kirven v. Virginia-Carolina Chemical Co., 145 Fed. 288.  
Baltimore Trust Co. v. Sereven County, 238 Fed. 834.  
Commercial Trust Co. v. Laurens County, *supra*.

In my opinion the plaintiff has failed to bring itself within the rule announced and applied in these cases. The application for the loan was made by a citizen of this state to Bevis Brothers, who were citizens of the same state. The note and mortgage were executed to or in favor of a member of that firm, and were negotiated and sold by the firm as independent operators and contractors. They might have sold the note and mortgage to the plaintiff or to any other person or concern. They might have sold them according to their custom either before or after the advancement of the money, but whether sold, or when sold, or to whom sold rested entirely with them. They were not acting as agents for the plaintiff, nor were they acting as agents for the mortgagors. Whatever obligation was assumed upon the execution of the note and mortgage was assumed by Bevis Brothers and by no one else, and had they refused to advance the money on the note and mortgage a right of action would accrue against them, and against them alone. Attention has been directed to the fact that a charge for a commission appears on the statement furnished to the mortgagors, but that fact of itself is not controlling. Bevis Brothers were engaged in the mortgage loan business and of course were engaged in that business for profit. Their profit or compensation would in the end come from the mortgagors in the form of a commission, in the form of a second mortgage, or in the form of an increased rate of interest, but whatever form the transaction might take it could not establish an agency where an agency did not otherwise exist. The case differs in no respect from the ordinary case where a person purchases property for resale.

- 49 It was suggested on the argument that inasmuch as the suit is brought upon the assumption agreement contained in the deed and not upon the note and mortgage, the requisite diversity of citizenship exists in any event, but with this contention I am unable to agree. Discussing a similar question in American Waterworks & Guarantee Co. v. Home Water Co., 115 Fed. 171, 176, the Court said:

"But it is urged that, as complainant does not claim by privity of contract, but by right of subrogation, this rule does not apply, if the necessary diversity of citizenship between the subrogee and the debtor exists. While it is true that the right of subrogation does not depend upon privity between the parties, but is the creature of courts of equity, yet the subrogee is merely an equitable assignee, and for jurisdictional purposes can have no greater rights than the assignee of a chose in action. As the water company, the assignor, could not maintain an action in this court on account of diversity of citizenship, neither can its assignees, whether they are such by contract of the parties or by subrogation."

For these reasons the court is without jurisdiction, and the complaint must be dismissed without expressing any opinion upon the merits.

It is so ordered.

[File endorsement omitted.]

UNITED STATES OF AMERICA,

*Eastern District of Washington, ss:*

I, Alan G. Paine, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages constitute and are a complete, true and correct copy of the record, pleadings, orders and all proceedings had in said action, as called for by the Preceipe for record on appeal, and the same which I transmit constitute my return to the order of appeal, filed in my office on the 6th day of February, 1923.

I hereby annex and transmit the original Citation issued and filed in said suit, and all exhibits called for in the Preceipe for record on appeal.

I further certify that the cost of preparing and certifying said record amounts to the sum of \$20.90, and that the same has been paid in full by the complainant and appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at the City of Spokane, in said Eastern District of Washington, in the Ninth Judicial Circuit, this 20th day of March, A. D. 1923, and the Independence of the United States of America the One Hundred and Forty-seventh. Alan G. Paine, Clerk U. S. District Court for the Eastern District of Washington.  
[Seal of the United States District Court, Eastern District of Washington.]

Endorsed on cover: File No. 29,483. Eastern Washington D. C. U. S. Term No. 933. Citizens Savings Bank and Trust Company, appellant, vs. Joseph F. Sexton, as executor of the estate of Quincy D. Chapman, deceased, et al. Filed March 27th, 1923. File No. 29,483.

(9188)